Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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NICHOLAS SALTARIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GERALD V. SCOTTI,
Attorney at Law
8383 Wilshire Blvd.,
Suite 528
Beverly Hills, CA 90211
(213) 651-2822

Counsel of Record and
Attorney for Petitioner
NICHOLAS SALTARIS

42pp

QUESTIONS PRESENTED FOR REVIEW

First, where was no evidence of active employment of the firearm presented at trial, may a conviction for a violation of 18 U.S.C. § 924(c)(1) stand in light of Bailey v. United States, 116 S.Ct. 501 (1995), when the indictment under which petitioner was charged merely alleged that he "possessed" a firearm, and the jury was instructed that the petitioner was charged with "using" a firearm?

Second, should this Court resolve a conflict among the Circuit Courts of Appeal as to the appropriate action to take in cases where a jury, prior to this Court's decision in Bailey v. United States, 116 S.Ct. 501 (1995), was improperly instructed on the meaning of "uses or carries" under 18 U.S.C. § 924(c)(1)?

PARTIES TO THE PROCEEDINGS

There are not parties to this proceeding other than those listed in the caption of this case.

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NICHOLAS SALTARIS,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, NICHOLAS SALTARIS, respectfully petitions for a writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

I

OPINION BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals was filed on September 25, 1996, and is unreported. [A copy is attached hereto as Exhibit A to the Appendix.] The order denying a petition for rehearing was filed on December 26, 1996. [A copy is attached hereto as Exhibit B to the Appendix.]

II

JURISDICTION

The court of appeals issued its memorandum opinion on September 26, 1996, and denied the petition for rehearing in this case on December 26, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 13.1, Supreme Court Rules.

III

RELEVANT STATUTORY PROVISION

Title 18, United States Code, Section 924(c)(1), provides in pertinent part:

"(c)(1) Whoever, during and in relation to any...drug trafficking crime...for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such...crime, be sentenced to imprisonment for five years...."

IV

STATEMENT OF THE CASE

A. JURISDICTION OF THE DISTRICT COURT

The district court had jurisdiction over the criminal prosecution in this case pursuant to 18 U.S.C. § 3231, where the indictment charged petitioner with criminal offenses in violation of Title 18

and Title 21 of the United States Code.

The district court has jurisdiction over petitioner's collateral attack of his conviction pursuant to 28 U.S.C. § 2255.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

1. **Charges**

On February 7, 1992, an indictment was returned charging petitioner Nicholas Saltaris with conspiracy to possess and distribute a controlled substance (cocaine), in violation of 21 U.S.C. § 846 [Count One]; possession with intent to distribute a controlled substance (cocaine), in violation of 21 U.S.C. § 841(a)(1) [Count Two]; and possessing a firearm in relation to those offenses, in violation of 18 U.S.C. § 924(c)(1) [Count Three].

2. **Facts**

Officers from the Ontario, California police department assigned to a narcotics task force began surveillance of Mr. Saltaris and a codefendant on January 22, 1992. On January 23, 1992, the police were surveilling the parking lot of a Motel 6 in Ontario when they observed Mr. Saltaris and a codefendant load five cardboard boxes into the cab portion of a tractor/trailer type truck. They then observed Mr. Saltaris leave his room with his luggage and place it in the cab portion of the truck.

The officers followed the truck to a truck stop in Ontario, where they blocked its path and arrested Mr. Saltaris and a codefendant. Inside the truck the police found a total of 130 kilograms of cocaine. Inside of one of Mr. Saltaris' pieces of luggage police found an unloaded 9

millimeter Smith & Wesson pistol; that pistol was itself inside of a closed gun case. Police also found two loaded magazines for the pistol inside of the gun case separate from the pistol.

An indictment was returned against Mr. Saltaris and five others on February 7, 1992. Count Three of that indictment charged Mr. Saltaris with "possession" of a firearm in violation of 18 U.S.C. § 924(c)(1). [Count Three of the indictment is attached as Exhibit C to the Appendix.]

The trial of Mr. Saltaris began on June 30, 1992. On July 17, 1992, the jury was instructed that Count Three charged Mr. Saltaris with "using a firearm in relation to a drug trafficking crime in violation of Section 924(c) of Title 18 of the United States Code." [A copy of the instructions relevant to Count Three are attached as Exhibit D to the Appendix.]

The jury was instructed that, "The term 'uses or carries a firearm' may be proved by finding that the firearm is available....A firearm may be considered available if its physical proximity during the commission of the offense supports an inference that the weapon emboldened the defendant commit the underlying offense." The term "carries" was not otherwise defined or mentioned in the instructions. A copy of the indictment, which charged Mr. Saltaris with "possession" of the weapon, was given to the jury for its consideration during deliberations.

On July 17, 1992, the jury returned a verdict of guilty as to all three counts against Mr. Saltaris.

On October 9, 1992, Mr. Saltaris was sentenced to an aggregate term of imprisonment of 248 months, with a 188 month term imposed on counts one and two,

and a consecutive 60 month term imposed on count three.

On appeal, Mr. Saltaris raised, **inter alia**, the issue of the sufficiency of the evidence as to the § 924(c)(1) conviction. That conviction was affirmed on direct appeal to the Ninth Circuit on May 19, 1994. This Court denied certiorari in Saltaris v. United States, 115 S.Ct. 210 (1994), on October 3, 1994.

Petitioner subsequently moved to vacate his conviction pursuant to 28 U.S.C. § 2255. That motion was denied. While the appeal of the denial of that motion under 28 U.S.C. § 2255 was pending in the Ninth Circuit, this Court issued its opinion in Bailey v. United States, 116 S.Ct. 501 (1995). Following the lead of the Ninth Circuit in United States v. Garcia, 77 F.3d 274 (9th Cir. 1996), Mr. Saltaris raised the applicability of

Bailey in his opening brief, arguing that the Bailey decision required that the court reverse his § 924(c)(1) conviction based upon the fact that there was insufficient evidence to sustain his conviction for "using" a firearm in relation to a drug trafficking offense. In its answering brief, the government conceded that Mr. Saltaris' § 924(c)(1) conviction could not be affirmed on a "use" theory.[1] However, the government went on to argue that Mr. Saltaris' conviction should be sustained based upon a claim that there was sufficient evidence to support a conviction under a "carries" theory. In his reply brief, Mr. Saltaris pointed out that the indictment charged "possession," the jury was told that Mr.

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[1] The government did not object to the procedure of raising that issue at that stage of the proceedings.

Saltaris was charged "with using a firearm," and that the jury was not properly instructed on the meaning of "uses or carries" so as to allow the court to properly sustain a conviction under a "carries" theory.

On September 26, 1996, the Ninth Circuit rejected Mr. Saltaris' contention and affirmed the order denying the motion to vacate. In a petition for rehearing, Mr. Saltaris pointed out that the Ninth Circuit's decision was in conflict with the decisions of other circuit courts. The Ninth Circuit denied the petition for rehearing on December 26, 1996.

C. REASONS FOR GRANTING THE WRIT

1. **Conflict with Bailey.**

In Bailey v. United States, ___ U.S. ___, 116 S.Ct. 501 (1995), this Court held that a defendant could not be convicted for "use" of a firearm within the meaning

of 18 U.S.C. § 924(c)(1) based upon simple possession of the firearm near narcotics. This Court rejected a conviction for "use" under § 924(c)(1) based upon a theory that the firearm emboldened the defendant. This Court went on to distinguish the meaning of "uses" under § 924(c)(1) from the meaning of "carries" under § 924(c)(1).

Prior to this Court's decision in Bailey, there was a "sold wall of authority" in the Ninth Circuit that a defendant could be convicted for a violation of § 924(c)(1) by merely **possessing** a weapon during a narcotics transaction. See, United States v. Lopez, 100 F.3d 98, at notes 3 and 10, (9th Cir. 1996); United v. Garcia, 77 F.3d 274, 277

(9th Cir. 1996).[2] In Bailey, which consolidated two separate cases, this Court remanded those cases to the Court of Appeals to allow it to consider whether the conviction could be sustained under a "carries" theory, specifically noting that both defendants had been charged with "using or carrying" a firearm. However, when a defendant is charged only with "use" of a firearm under § 924(c)(1), and there is insufficient evidence to support a conviction for "use" in light of Bailey, the conviction must be reversed even if he could have been convicted for "carrying." See, United States v. Garcia, 86 F.3d 394

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[2] Because Mr. Saltaris raised the sufficiency of the evidence to sustain the § 924(c)(1) conviction prior to this change in the law, it was clearly appropriate for him to raise it during the § 2255 appeal. See, Davis v. United States, 417 U.S. 333 (1974)(Propriety of raising issue during § 2255 proceeding after intervening change in the law).

(5th Cir. 1996)(Defendant was not charged with "carrying" and therefore conviction reversed).

In the instant case, the indictment charged Mr. Saltaris with "possession" of a firearm in relation to a drug trafficking offense. [See Exhibit C to the Appendix.] Moreover, the jury was instructed that Mr. Saltaris was charged "with using a firearm in relation to a drug trafficking crime." [See Exhibit D to the Appendix.] Therefore, under Bailey, the Ninth Circuit should have reversed the conviction based upon the insufficiency of the evidence. Because Mr. Saltaris was never charged with "carrying" a firearm the Ninth Circuit should not have sustained his conviction on a "carrying" theory. In doing so, it misread the intent of this Court's decision in Bailey and this Court should grant review to

correct that mistake.

2. **Conflict Among the Circuits.**

This Court has an interest in resolving conflicts among the circuits. Rule 10.1(a), Supreme Court Rules. Presently the circuits appear almost evenly split as to the procedure for the review of convictions in light of Bailey v. United States, where the jury was improperly instructed on the meaning of "use" of a firearm under § 924(c)(1).

a. **"Would Have Convicted" Circuits.**

A minority of circuits have adopted a "would have convicted" approach in rejecting challenges to § 924(c)(1) convictions post-Bailey, where the jury had been improperly instructed on the "use" prong. This is best summarized in the recent decision by the Seventh Circuit in United States v. Windom, 103 F.3d 523, 524 (7th Cir. 1996)(Evidence sufficient to

conclude that the jury would have undoubtedly convicted had it properly been instructed).[3] This is essentially the path followed by the Ninth Circuit in United States v. Lopez, 100 F.3d 98 (9th Cir. 1996) and the Second Circuit in United States v. Pimentel, 83 F.3d 55 (2nd Cir. 1996).

Mr. Saltaris' conviction was affirmed by the Ninth Circuit under this "would have convicted" approach.

b. **"Don't Know" Circuits.**

In contrast, the majority of the circuits have adopted a "don't know" approach that has resulted in the reversal of a number of § 924(c)(1) post-Bailey,

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[3] The Windom court, in reviewing the other decisions by the Seventh Circuit regarding post-Bailey, evaluation of § 924(c)(1) convictions, failed to note the decision in United States v. Ienco, 92 F.3d 564 (7th Cir. 1996), which falls squarely in the "Don't Know" camp.

where the jury had been improperly instructed on the "use" prong. Under this second approach, the courts recognized that they could not know whether the jury convicted based upon an improperly instructed "use" theory, or a proper "carrying" theory. See, United States v. Hawthorne, 94 F.3d 118, 122 (4th Cir. 1996)(On remand from Supreme Court); United States v. Smith, 94 F.3d 122 (4th Cir. 1996)(same); United States v. Ienco, 92 F.3d 564 (7th Cir. 1996)[4]; United States v. Behler, 100 F.3d 632 (8th Cir. 1996); United States v. Webster, 84 F.3d 1056 (8th Cir. 1996); United States v. Simpson, 94 F.3d 1244 (10th Cir. 1996); United States v. Spring, 80 F.3d 1450

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[4] The Seventh Circuit also reversed in a case where there was no active employment of the firearm and the evidence supported, **but did not compel**, a conviction for carrying. United States v. Smith, 80 F.3d 215, 221 (7th Cir. 1996).

(10th Cir. 1996).[5] The Sixth Circuit would appear to have the same approach, where it remanded a conviction after a court trial where it could not determine the basis of the conviction. United States v. Malcuit, 104 F.3d 880 (6th Cir. 1997).

The view of the majority of the circuits is largely based upon this Court's decision in Sullivan v. Louisiana, 508 U.S. 275, 275-81 (1993), where it was noted that a jury could not be expected to know which instructions are proper, and which instructions are improper, and then only convict based upon proper

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[5] The Tenth Circuit first reviews the evidence to see if it is sufficient to sustain a conviction on either a "use" or "carrying" theory. If it is not, then the conviction is reversed with directions that a judgement of acquittal be entered. United States v. Smith, 82 F.3d 1564 (10th Cir. 1996).

instructions.

Based upon the clear conflict among the circuits, this Court should grant certiorari to resolve the conflict.

V

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the petition for certiorari.

Respectfully submitted,

GERALD V. SCOTTI
Attorney for Petitioner
NICHOLAS SALTARIS

APPENDIX TO PETITION FOR CERTIORARI

EXHIBIT A - Memorandum Opinion of Ninth Circuit dated September 26, 1996

EXHIBIT B - Order Denying Rehearing dated December 26, 1996

EXHIBIT C - Count Three of the Indictment

EXHIBIT D - Jury Instructions Related to Count Three

EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 95-56690
Plaintiff-Appellee,	D.C. Nos. CV-95-4278-JSL
v.	CR-92-98-JSL
NICHOLAS SALTARIS,	MEMORANDUM*
Defendant-Appellant.	

Appeal from the United States District Court for the Central District of California J. Spencer Letts, District Judge, Presiding

Submitted September 20, 1996**

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* This disposition is not suitable for publication and may not be cited to or by the courts of this Circuit except as provided by 9th Cir. R. 36-3.7.

** The panel unanimously finds this case appropriate for submission on the record and briefs and without oral argument per Fed. R. App. 34(a) and 9th Cir. R. 34-4.

Before: KOZINSKI and LEAVY, Circuit Judges and SCHWARZER,*** District Judge.

Nicholas Saltaris appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate his conviction and from the district court's subsequent refusal to reconsider that decision, arguing that he was denied his Sixth Amendment right to counsel and that the evidence was insufficient to support his conviction for use of a firearm in a drug trafficking offenses. We reject each of these contentions and affirm.

I

Saltaris first argues that the district court erred by denying his section 2255 motion without conducting an evidentiary hearing on the question of

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*** The Honorable Williams W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

whether his defense counsel was ineffective by failing to advance a Public Authority defense. Specifically, Saltaris contends that defense counsel was ineffective because he did not (1) present the defense; (2) disclose, review, and discuss with Saltaris the government's file on him which showed that he had acted a confidential informant several years before; (3) impeach a DEA agent's testimony regarding these prior "services"; and (4) call a particular witness to impeach a detective's testimony and corroborate Saltaris' version of events concerning post-arrest discussions with the government.

At trial, Saltaris claimed ignorance of the cocaine in the truck in which he was riding, but now claims that his lawyer was ineffective by not arguing that his client was really working for the DEA as

an informant. These two defenses would have been completely contradictory. Moreover, Saltaris testified that he had only helped the DEA one time before, and denied offering to help officers after his arrest.

As we recently noted,

> 28 U.S.C. § 2255 requires a district court to hold an evidentiary hearing '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' The movant must 'make specific factual allegations which, if true, would entitled him to relief.' United States v. Keller, 902 F.2d 1391, 1395 (9th Cir. 1990) (quoting Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1992)). The district court should have held a hearing unless [the defendant's] allegations of ineffective assistance of counsel, when viewed against the record, either did not state a claim for relief or were 'so palpably incredible or patently frivolous as to warrant summary dismissal.' Marrow v. United States, 772 F.2d 525, 526 (9th Cir. 1985) (quoting United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984) (per uriam [)].

Quintero v. United States, 33 F.3d 1133,

1135 (9th Cir. 1994) (per curiam) (some brackets added).

Given the meritless nature of this claim, the district judge cannot be said to have abused his discretion by declining to hold an evidentiary hearing on this issue. See, United States v. Blaylock, 20 F.3d 1458, 1464 (9th Cir. 1994) (as amended); Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982).

II

In order for Saltaris to prevail on his claim that the trial counsel's defense as so ineffective as to deprive him of his Sixth Amendment right, he had to allege and show that his lawyer's performance fell so far below an objective standard of reasonable- ness that the lawyer's defective performance prejudiced Saltaris to the point of denying him a fair trial. See Strickland v. Washington, 466 U.S.

668, 687-90 (1984). Our review of the materials before us shows that Saltaris' argument fails both the "deficient performance" and the "prejudice" prongs of the Strickland test. The district court did not err by denying the relief requested.

III

Citing the Supreme Court's recent decision in Bailey v. United States, 116 S.Ct. 501 (1995), Saltaris argues that his conviction on Count III for possession of a firearm during the course of a drug trafficking offense must be set aside for lack of sufficient proof. While the government concedes that Saltaris' 18 U.S.C. § 924(c)(1) conviction cannot be upheld under the narrow "use" prong discussed in Bailey, see United States v. Polanco, -- F.3d --, --, No. 95-50341, slip op. 10137, 10157 (9th Cir. Aug. 15,

1996); United States v. Willett, 90 F.3d 404, 407 (9th Cir. 1996), it argues that the evidence was sufficient on the broader "carrying" test. We agree with the government's position.

Viewed in the light most favorable to the prosecution, the evidence was that Saltaris carried the sports bar containing the weapon to the truck; the pistol's magazines were fully loaded and lying next to the firearm in the same piece of luggage; the bag containing the weapon and ammunition was in the truck cabin within easy reach of Saltaris; and, as we noted in Saltaris prior appeal, Saltaris conceded that the handgun found in his sports bag near the drugs was in his possession. We conclude that a rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. See Jackson v.

Virginia 443 U.S. 307, 319 (1979).

AFFIRMED.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 95-56690
Plaintiff-Appellee,	D.C. Nos. CV-95-4278-JSL
v.	CR-92-98-JSL
NICHOLAS SALTARIS,	ORDER
Defendant-Appellant.	

Before: KOZINSKI and LEAVY, Circuit Judges and SCHWARZER,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Kozinski and Leavy have voted to reject the suggestion for reehearing en banc, and Judge Schwarzer has so recommended.

The full court has been advised of

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* The Honorable Williams W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en bac is REJECTED.

EXHIBIT C

COUNT THREE

[18 U.S.C. §§ 924(c)(1). 924(d)(1)]

On or about January, 23, 1992, in San Bernardino County, within the Central District of California, defendant NICHOLAS SALTARIS knowingly possessed a firearm, names a Smith & Wesson 9 millimeter pistol serial number TD1418, during and in relation to drug trafficking crimes, names, conspiracy to possess with intent to distribute and distribute cocaine, in violation of Title 21, United States Code, Section 846, and possession with intent to distribute cocaine, in violation of Title 21, United States Code, Section 846, and possession with intent to distribute cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

The Grand Jury further alleges that

the above-described firearm is subject to forfeitrue pursuant to Title 18, United States Code, Section 924(d).

EXHIBIT D

Defendant Nicholas Saltaris is charged in Count Three of the indictment with using a firearm in relation to a drug trafficking crime in violation of Section 924(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, as charged in the indictment, or possession with intent to distribute cocaine, as charged in Count Two of the indictment; and,

Second, the defendant knowingly

used a Smith & Wesson 9 millimeter pistol, serial number TD1418 while committing the crime.

The term "firearm" means "any weapon, which will or is designed to or may be readily converted to exprel a projectile by action of an explosive."

In order to convict a defendant of using a firearm during a drug trafficking offense, the government does not have to provde that the firearm was loaded or operable.

The term "uses or carries a firearm" may be proved by a finding that the firearm is available to Defendant Saltaris during the commission of the offenses charged in either Counts One or Two of the indictment. A firearm may be considered available if its physical proximity during the commission of the offense supports an inference that the weapon emboldened the

defendant to commit the underlying offense.